

86-723

No. ....

Supreme Court, U.S.  
FILED

OCT 27 1986

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1986

— o —  
BEA COHEN,

*Petitioner,*

vs.

WORKERS' COMPENSATION APPEALS BOARD  
OF THE STATE OF CALIFORNIA; CALIFORNIA  
EXTERMINATORS; ROYAL INSURANCE  
CO.; EL DORADO INSURANCE CO.;  
INDUSTRIAL INDEMNITY; FIREMAN'S FUND  
INSURANCE; AND FREMONT INDEMNITY CO.,

*Respondents.*

— o —  
**PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEAL OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT**

— o —  
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*Counsel for Petitioner*

October 24, 1986

29130



## QUESTION PRESENTED

California *Labor Code*, Section 5406 (West Supp. 1986) provides as follows in fixing certain time limits within which a claim for workers compensation death benefits must be commenced:

Except as provided in Section 5406.5,<sup>1</sup> the period within which may be commenced proceedings for the collection of the benefits provided by Article 4 (commencing with Section 4700) of Chapter 2 of Part 2 is one year from:

The date of death where death occurs within one year from date of injury; or

The date of last furnishing of any benefits under Chapter 2 (commencing with Section 4550) of Part 2, where death occurs more than one year from the date of injury; or

The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury.

Although Petitioner's claim for death benefits did not ripen until after the 240 week statute of limitations of Labor Code, Section 5406 had expired, Petitioner's claim was denied by the Workers' Compensation Appeals Board of the State of California solely by reason of an occur-

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<sup>1</sup> Labor Code, Section 5406.5 (West Supp. 1986) provides: "In case of death of an asbestos worker from asbestosis, the period within which may be commenced proceedings for the collection of benefits provided by Article 4 (commencing with Section 4700) of Chapter 2 of Part 2 is one year from the date of death."

rence outside of all human control: that her spouse died subsequent to the expiration of the statutory period.

The question thus presented is: did the refusal of the Workers' Compensation Appeals Board of the State of California to consider the merits of Petitioner's case by applying the statute of limitations provisions of California *Labor Code*, Section 5406 to bar her from receiving workers compensation death benefits before the right to death benefits ever accrued, where Petitioner's spouse's death was caused by a latent and progressive disease which resulted in his death more than 240 weeks after the date fixed for the date of his industrially caused injury, and where Petitioner filed an Application for Adjudication of Claim for Death Benefits within one year of her spouse's death, violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

## LIST OF PARTIES

Petitioner is the widow of Ben Cohen, who died on June 4, 1983, by reason of injuries sustained on September 16, 1978. On that date, Petitioner was residing with decedent and was totally dependent upon him for support.

Respondents in this proceeding are the Workers' Compensation Appeals Board of the State of California, which issued the initial decision denying Petitioner's Application for Adjudication of Claim for Death Benefits; and Royal Insurance Co., El Dorado Insurance Co., Industrial Indemnity Co., Fireman's Fund Insurance Co., and Fremont Indemnity Co., which are corporations authorized to transact the business of workers compensation insurance in the State of California and, during the time of Petitioner's decedent husband's injuries, insured the decedent's employer, California Exterminators, against liability arising under the workers' compensation laws of California.

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No. ....

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In The  
**Supreme Court of the United States**

October Term, 1986

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BEA COHEN,

*Petitioner,*

vs.

WORKERS' COMPENSATION APPEALS BOARD  
OF THE STATE OF CALIFORNIA; CALIFORNIA  
EXTERMINATORS; ROYAL INSURANCE  
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INDUSTRIAL INDEMNITY; FIREMAN'S FUND  
INSURANCE; AND FREMONT INDEMNITY CO.,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEAL OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT**

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To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:

Petitioner Bea Cohen respectfully prays that a Writ  
of Certiorari issue to review the Judgment by the Court of  
Appeal, Fourth Appellate District, Division Three, of the  
State of California entered on May 12, 1986, in the above-  
entitled proceeding.

## **OPINIONS BELOW**

The Order Denying Review after Judgment by the Court of Appeal of California filed by the Supreme Court of California, has not been reported. It is reprinted in Appendix A to this Petition, at page App. 1. The Court of Appeal of California has rendered a Judgment (entitled "Order") which is reprinted in Appendix A to this Petition, at page App. 2.

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## **JURISDICTION**

The Judgment of the Court of Appeal of California was entered on May 12, 1986. A timely Petition for Hearing was filed in the Supreme Court of California on May 22, 1986. On July 31, 1986, the Order Denying Review after Judgment by the Court of Appeal, filed by the Supreme Court of California, finally denied Petitioner's Petition for Hearing on said Judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

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## **CONSTITUTIONS INVOLVED**

This case involves the provisions of Section 4, Article XIV of the Constitution of the State of California (West Supp. 1986). Said section is reprinted in Appendix B to this Petition, at page App. 3.

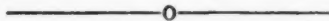
This case also involves Section 1, Article III of the Constitution of the State of California (West 1983) which reads as follows:

Sec. 1. The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.

These provisions may be found in West's Annotated California Codes, Constitution, Article XIV, Sec. 4, and Article III, Sec. 1.

This case also involves Section 1 of the Fourteenth Amendment of the Constitution of the United States. Said section reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis added.)



## STATEMENT OF THE CASE

Petitioner's husband Ben Cohen was employed as a pest control operator during the period of May, 1962, to September 16, 1978, at Los Angeles, California, by California Exterminators. During the course of his employ-

ment, Ben Cohen sustained injury arising out of and occurring in the course of his employment consisting of cirrhosis of the liver, a latent, progressively debilitating disease. On October 11, 1977, Ben Cohen filed a claim with the Workers' Compensation Appeals Board of the State of California (hereafter, "Board") for workers' compensation disability benefits.

During the pendency of Ben Cohen's application, from 1977 through 1981, the Respondent insurance carriers had full opportunity to, and did, investigate the nature of Ben Cohen's industrially-related injuries, both during the course of hearings at the Board, and by taking his deposition.

By Order dated January 9, 1981, the Board awarded disability benefits to Ben Cohen, which included lifetime weekly payment benefits. Pursuant to an Order of October 16, 1980, the date of last injurious exposure of Ben Cohen to the toxic chemicals and pesticides which he used during his employment, was fixed by the Board as September 16, 1978.

Ben Cohen died from liver cirrhosis on Saturday, June 4, 1983, which was more than 240 weeks from the date fixed as his date of injury of September 16, 1978. Only six days after the date of the death of Ben Cohen, Petitioner Bea Cohen, as the surviving spouse of Ben Cohen, filed an Application for Adjudication of Claim for Death Benefits with the Board.

On August 11, 1983, Respondent Royal Insurance Co., filed a Petition with Respondent Board seeking dismissal of Petitioner's claim for death benefits on the ground

that, inasmuch as the claim was not filed within 240 weeks of the date of decedent's injury, the claim was barred pursuant to the provisions of California *Labor Code*, Section 5406.

## I.

### **How The Federal Question Was Presented.**

On August 23, 1984, Respondent Board, through a worker's compensation judge, issued an Order directing Petitioner to file and serve points and authorities with respect to her position that the Board had jurisdiction with respect to proceeding forward to adjudicate the death claim. On September 18, 1984, Petitioner timely served and filed a Memorandum of Points and Authorities in opposition to Respondent Royal's request for dismissal of Petitioner's Application for Adjudication of Claim, with Respondent Board, wherein Petitioner alleged that dismissal of Petitioner's Application where the statute of limitations operates to bar her right to adjudicate her Application before that right accrues constitutes a denial of equal protection of the laws (Memorandum at pages 26 to 45).

On October 25, 1985, Petitioner filed with the Board a Stipulation wherein, for the purposes of determining the issue of whether Bea Cohen's Application for Adjudication of Claim for Death Benefits was barred pursuant to California *Labor Code*, Section 5406, as having been filed more than 240 weeks from the date of injury of the decedent, Petitioner stipulated that her "first knowledge" of the industrial nature of her husband's injury was more than 240 weeks prior to the date of his death.

On January 10, 1986, Respondent Board issued an order stating that Petitioner's Application for death bene-

fits was not timely and that Respondent Royal Insurance Co.'s petition to dismiss the application of Bea Cohen filed June 10, 1983, for death benefits resulting from the death of Ben Cohen on June 4, 1983, was granted, and that said application was thereby dismissed.

On January 30, 1986, Petitioner timely filed a verified Petition for reconsideration with Respondent Board. In said Petition, Petitioner again asserted that dismissal of her application, where the statute of limitations operates to bar her right to adjudicate her application before that right accrues, constitutes a denial of equal protection of the laws (Petition, at pages 18 to 35).

On February 14, 1986, the Workers' Compensation Appeals Board Judge served a Report and Recommendation on Petition for Reconsideration, recommending that the Petition for Reconsideration be denied. In addressing Petitioner's argument that California *Labor Code*, Section 5406, violates Petitioner's right to equal protection of the laws, the Workers' Compensation Judge, in said Report, stated at pages 4 to 6, the following:

The cases cited by Petitioner in support of her argument that Labor Code Section 5406 violates her constitutional right to equal protection, involved instances of gender discrimination and discrimination against protected classes such as illegitimate children. Actually, if Petitioner's argument in this regard were correct, it would serve to invalidate all statutes of limitations. For example, what is the difference in substance, between the applicant who files his petition for increased benefits due to the serious and willful misconduct of the employer 364 days after the injury as compared to one who files two days later? When the Legislature decides to establish a cutoff point in the form of a statute of limitations, of necessity, there

will be those who fall on both sides of the line. This does not create a separate "class" of individuals. Although the Judge believes that the decision was correct in accordance with the present law, the result is admittedly harsh in the case of an applicant whose husband undisputedly suffered from an industrially-caused disease of a progressive nature which ultimately, and not surprisingly, resulted in his death. In this regard, Herbert A. Rubin, M.D., had stated in his report of February 1, 1979, filed herein, that, "cirrhosis is irreversible and will ultimately lead to end-stage liver disease and this is a process whose rate of development cannot be reasonably predicted."

Cirrhosis of the liver is only one of a number of internal disease processes involving a protracted period of disability eventually leading to death. Perhaps in the years that have elapsed since the 1947 amendment to Labor Code Section 5406 and the 1955 *Ruiz* decision, medical knowledge has progressed to extend, but not ultimately preserve the lives of individuals who thirty years earlier would have succumbed much more quickly. It is notable that Labor Code 5406, enacted in 1980, imposes upon dependents of those deceased of asbestos exposure, the sole limitation of filing the application within one year of the date of death.

On March 25, 1986, Respondent Board issued its Opinion and Order Denying Reconsideration. Said Opinion, stated in part, at page 1, as follows:

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation judge [served on February 14, 1986, referred to above] with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

On May 7, 1986, Petitioner filed a Petition for Writ of Review with the Court of Appeal of California, Fourth



Appellate District, Division Three. In said Petition, at page 10, Petitioner requested issuance of a Writ of Review on the constitutional grounds that Petitioner was deprived of equal protection of the laws in violation of Section 4, Article XIV and Section 1, Article III of the Constitution of the State of California, and in violation of the Fourteenth Amendment of the Constitution of the United States. On May 12, 1986, the Court of Appeal of California filed an Order denying Petitioner's Petition for Writ of Review, without opinion, but citing California Labor Code, Section 5406 and *Ruiz v. Industrial Accident Commission*, 45 Cal.2d 409, 289 P.2d 229 (1955).

On May 22, 1986, Petitioner timely filed her Petition for Hearing with the Supreme Court of California. Petitioner contended therein that application of the statute of limitations set forth in California *Labor Code*, Section 5406 so as to bar her claim for death benefits before such claim accrued, where Petitioner's decedent spouse died more than 240 weeks after the industrially caused injury, constituted a denial of equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States (Petition for Hearing, pages 15-26).

The Supreme Court of California filed an Order on July 31, 1986, denying Petitioner's Petition for Hearing, without opinion. However, said Order stated that Mme. Chief Justice Bird and Mr. Justice Mosk were of the opinion that the Petition should have been granted.



## REASONS FOR GRANTING THE WRIT

This case concerns the arbitrary exclusion of certain classes of individuals from receiving workers' compensation death benefits from the Workers' Compensation Appeals Board of the State of California. The Board and the Court of Appeal of California, in denying Petitioner and others similarly situated such benefits, have violated an enactment of the California Legislature mandating that workers' compensation statutes are to be liberally construed with the purpose of extending their benefits to claimants.<sup>2</sup> Such a drastic and capricious denial of benefits by a public agency deserves this Court's attention.

Inasmuch as every State of the United States has enacted a statutory scheme for the awarding of workers' compensation death benefits,<sup>3</sup> review by this Court of the constitutional issues presented herein is vital not only to claimants in California, but throughout the United States. Moreover, in most jurisdictions, there is a separate statute of limitations period which applies to death benefit claims.<sup>4</sup> Lower courts need guidance from this Court as to the applicability of statutes of limitation which operate to bar a compensation death benefits claimant's right to compensation before such right accrues by the mere fortuity that the claimant's employee-spouse dies subsequent to the expiration of the limitations period.

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<sup>2</sup> Cal.Lab. Code, Sec. 3202 (West Supp. 1986) provides:

"Division 4 (commencing with Section 3201) and 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

<sup>3</sup> 4 A. Larson, *The Law of Workmen's Compensation*, Appendix B, Table 16 (1986).

<sup>4</sup> 3 *Id.*, Sec. 78.60 (1983).

The right to compensation death benefits of those survivors whose spouses die subsequent to the expiration of the 240 week statute of limitations period for filing claims for such death benefits, set forth in California *Labor Code*, Section 5046, is at issue in this case. Application of the statute in the instant case causes the wholly irrational result of barring a claim before it arises on the sole ground of the time when a spouse dies. This statute is not rationally related to a legitimate state interest, i.e., to prevent the assertion of stale claims by claimants who have failed to file their action until evidence is no longer fresh and witnesses no longer available, inasmuch as Petitioner's application was filed only six days subsequent to the time it first accrued (after the date of death of the decedent employee), and Respondents were afforded a full opportunity to investigate the nature of the industrially caused injury while evidence was still fresh and witnesses available during the time the decedent employee's application was pending before Respondent Board prior to his death. Accordingly, important questions of federal constitutional law are presented which have not been, but should be, resolved by this Court, inasmuch as workers' compensation benefits are being distributed unequally to applicants similarly situated and upon an irrational basis.

*Labor Code*, Section 5406, is not rationally related to a legitimate state interest and exceeds constitutional limits in discriminating against classes of similarly situated persons, thereby offending equal protection. "Class legislation" is invalid where the classification is arbitrary and unreasonable. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court stated, at 447:

The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

The primary purpose of statutes of limitation is to prevent the assertion of stale claims by claimants who have failed to file their action until evidence is no longer fresh and witnesses no longer available. The statutes are designed to serve a public purpose: preventing the assertion of demands which, through the unexcused lapse of time, have been rendered difficult or impossible to defend.

However, applying the statute of limitations set forth in *Labor Code*, Section 5406, so as to bar Petitioner's claim would not serve the purposes of the statute of limitations for the following reasons:

1. Petitioner's claim is not stale, because it was filed as early as practicable—only six days subsequent to the death of the decedent employee. The application for death benefits could not have been filed prior to the death of the decedent employee as the claim had not then accrued.

2. Petitioner's filing of her claim subsequent to the expiration of 240 weeks after the date fixed as the date of injury of the decedent employee was not unexcused, for the reason that the decedent employee died subsequent to the expiration of said 240 week period, thereby rendering it legally impossible for Petitioner to file her application for

death benefits prior to the expiration of said 240 week period.

3. Decedent employee's application for and the receipt of compensation disability benefits over the course of the 240 week period immediately preceding his death afforded Respondents a full opportunity to investigate the nature of the industrially caused injury while evidence was still fresh and witnesses available. Respondents did in fact take the decedent employee's deposition and did cross examine him at WCAB hearings.

When a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Hooper v. Bernalillo County Assessor*, — U.S. —, 105 S.Ct. 2862 (1985). However, the application of the provisions of *Labor Code*, Section 5406 discriminates against an arbitrarily selected class of persons who stand in precisely the same relation to the subject matter of the law as does the larger group from which they are segregated: the statute discriminates against those survivors whose spouses die subsequent to the expiration of the 240 week statute of limitations period, thereby barring their claim for compensation death benefits solely on the ground that their spouse died prior to the accrual of their right to file a claim therefor, and discriminates in favor of those survivors whose spouses die prior to the expiration of the 240 week statute of limitations period.

Further, as applied by California Court of Appeals decisions, set forth below, the statute (1) discriminates against those survivors whose spouses die subsequent to the expiration of the 240 week statute of limitations period,

whose claims for compensation death benefits are deemed barred by the statute on the grounds that the survivors *did discover* within the 240 week statute of limitation period that the decedent spouse's death was industrially caused, and (2) discriminates in favor of those survivors whose spouses die subsequent to said period, but whose claims for compensation death benefits would otherwise be deemed barred by the statute, but which is *tolled* on the grounds that the survivors *did not discover* within the 240 week statute of limitations period that the spouse's death was industrially caused. The statute as applied above thus causes the irrational result that penalizes surviving spouses who diligently discover at an early stage the cause of their spouse's injury, and rewards survivors who do not early discover the industrial nature of their spouse's illness by awarding benefits for late discovery.

The following three California Court of Appeals decisions illustrate that even though the applicant filed a claim for death benefits subsequent to the expiration of the 240 weeks from the date of injury of the decedent employee, the applicant's claim was held not to be barred, despite the otherwise apparent "clear words" of the bar of the statute.

The court in *Berkebile v. Workers' Compensation Appeals Board*, 144 Cal.App.3d 940, 193 Cal.Rptr. 12 (1983), held that Petitioner's claim for death benefits was timely filed even though filed more than 240 weeks after the decedent employee sustained his injury, where the applicant filed her claim within 240 weeks of the date that the applicant (surviving dependent), knew that the death was of industrial causation. The court held that this "rule

of discovery'' resulted in a timely filing of the applicant's claim for death benefits where the claim was filed within one year of the date of death of the decedent employee.

In *Roblyer v. Workers' Compensation Appeals Board*, 62 Cal.App.3d 574, 133 Cal.Rptr. 246 (1976), the court held that Petitioner's claim for death benefits was timely filed even though filed more than 240 weeks after the decedent employee sustained his injury, where Petitioner was 14 years old when decedent employee terminated his employment, but Petitioner was 19 years old at the time of the decedent employee's death (even though Petitioner's father did not die during Petitioner's minority).

*Arndt v. Workers' Compensation Appeals Board*, 56 Cal.App.3d 139, 128 Cal.Rptr. 250 (1976) held that where Petitioner's application for workers' compensation benefits was filed more than one year after the date of her husband's death and more than 240 weeks after he had last been exposed to toxic asbestos substances, Petitioner's claim was not barred since the stated commencement date for the running of the statute of limitations may be inoperative in cases where the claimant did not know that the act or omission at issue was the cause of the claimant's damages. The Court further stated that the date of discovery for the purpose of the statute of limitations was to be fixed as the statute's "date of injury."

Under either scheme of classification there is a denial of equal protection of the laws in that each classificatory scheme distinguishes between potential death benefit claimants on the basis of an event occurring over which no human has control: death of an employee spouse upon whom the claimant is dependent for support. Thus, an applicant



such as Bea Cohen, through no fault of her own, is subject to having her claim for compensation death benefits denied before her right thereto ever accrues by the mere fortuity that her spouse dies subsequent to the expiration of the 240 week statute of limitations period.

Petitioner's constitutional argument would not serve to invalidate all statutes of limitation, but rather, confines itself to circumstances where to apply a statute would serve no legitimate state purpose and would cause a wholly irrational result (barring a claim before it arises on the sole ground of the time when an employee spouse dies).

Moreover, if the statute were interpreted to require the application of the provisions of *Labor Code*, Section 5406 as it has been in *Berkebile v. Workers' Compensation Appeals Board*, *supra*, only in favor of applicants who file for benefits within 240 weeks of their discovery of the industrial nature of their spouse's fatal illness, such an application would impose peculiar disabilities upon an arbitrarily selected class of persons who stand in precisely the same relationship to the subject matter of the law as does the larger group from which they are segregated, i.e., compensation death benefits claimants filing their applications subsequent to the expiration of the 240 week period of the actual date of injury of the employee covered by workmen's compensation laws. The sole distinguishing characteristic entitling the applicant to death benefits would be whether the applicant had knowledge that the nature of the employee's injury was industrially related within 240 weeks of the filing of such application. Such a law constitutes a special law which is tantamount to a denial of equal protection.

If the statute were applied in the foregoing manner, it would result in under-inclusion, which occurs when a statute benefits or burdens persons in a manner that furthers a legitimate public purpose, but does not confer the same benefit or place the same burden on others who are similarly situated, which in some cases, this Court has found so arbitrary as to deny equal protection. (*Developments in the Law—Equal Protection*, 82 Harv.L.Rev. 1065, 1084 (1969).)

*Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) concerned the right of dependent unacknowledged illegitimate children to recover under the Louisiana workmen's compensation laws benefits for the death of their natural father on an equal basis with dependent legitimate children. This Court stated that Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimate children violated the Equal Protection Clause of the Fourteenth Amendment, and held as follows:

The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.

In California, the current application of the statute of limitations: (1) permits a dependent spouse to file a claim for compensation death benefits after 240 weeks from the employee's industrially related injury, but within 240 weeks of the applicant's "discovery" thereof; and (2) denies the right of dependents acting diligently who file within one year of the date of death of the deceased employee spouse (in this case, within a mere one week),



but after 240 weeks of the actual injury and their knowledge thereof, because they cannot claim the "late discovery" exception to toll the statute of limitations, since the injury was sustained and the knowledge thereof was acquired more than 240 weeks before the employee's death.

Thus, even if an applicant acts more diligently in filing her claim for compensation death benefits than another similarly situated claimant who claims not to have "discovered" the industrially related nature of the injury to her spouse until several months or years after the expiration of the limitations period set forth in California *Labor Code*, Section 5406, nevertheless, only the "late discovery" claimant is entitled to compensation death benefits. However, a Petitioner, such as Bea Cohen, would be denied the same compensation death benefits, by the mere fortuity that she knew of her husband's condition more than 240 weeks before his death, but could not file for death benefits sooner than 240 weeks after her discovery because her husband's death did not occur within 240 weeks of her knowledge of its industrial cause.

The instant case is distinguishable from other cases where dependent claimants have filed for compensation death benefits subsequent to the expiration of the 240 week statutory period of limitations, where there was no prior award of benefits to the deceased employee, and therefore, no opportunity for notice to the Respondents of the nature, extent, or validity of the claim for workers' compensation benefits.

**CONCLUSION**

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Court of Appeal of California. In the event that the Petition is granted, Petitioner prays that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to issue the Writ of Review as prayed for in the Petition.

Respectfully submitted,

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October 24, 1986

App. 1

**APPENDIX A**

ORDER DENYING REVIEW  
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G004058

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

IN BANK

COHEN, Petitioner,

v.

WORKER'S COMPENSATION APPEALS BOARD  
et al., Respondents.

(Filed July 31, 1986)

Petition for review DENIED.

Bird, C.J. and Mosk, J., are of the opinion  
the petition should be granted.

BIRD  
Chief Justice

App. 2

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BEA COHEN,  
(Ben Cohen, Deceased),

ORDER

Petitioner,

v.

G004058

THE WORKERS' COMPENSATION  
APPEALS BOARD OF THE STATE (WCAB Case No.  
OF CALIFORNIA, et al., 77 LA 418 809)

Respondents.

(Filed May 12, 1986)

THE COURT:\*

The petition for a writ of review is DENIED. (Lab. Code, S 5406; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Ruiz v. Industrial Acc. Com.* (1955) 45 Cal.2d 409.)

TROTTER

TROTTER, Presiding Justice

\* Before Trotter, P.J., Crosby, J. and Charamza, Judge\*\*

\*\* Assigned by Chairperson of the Judicial Council

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## **APPENDIX B**

### **California Constitution, Article XIV, Sec. 4.**

The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases

#### App. 4

expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.

The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State.

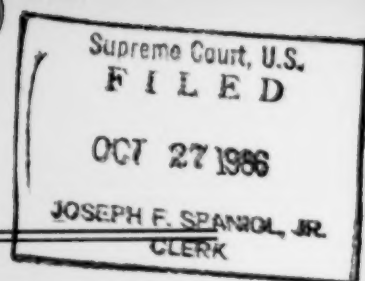
The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees or the employer.

Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed.



86-7 23 (2)



No. ....

In The  
**Supreme Court of the United States**  
October Term, 1986

— o —  
BEA COHEN,

*Petitioner,*

vs.

WORKERS' COMPENSATION APPEALS BOARD  
OF THE STATE OF CALIFORNIA; CALIFORNIA  
EXTERMINATORS; ROYAL INSURANCE  
CO.; EL DORADO INSURANCE CO.;  
INDUSTRIAL INDEMNITY; FIREMAN'S FUND  
INSURANCE; AND FREMONT INDEMNITY CO.,

*Respondents.*

— o —  
**SUPPLEMENTAL APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEAL OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT**

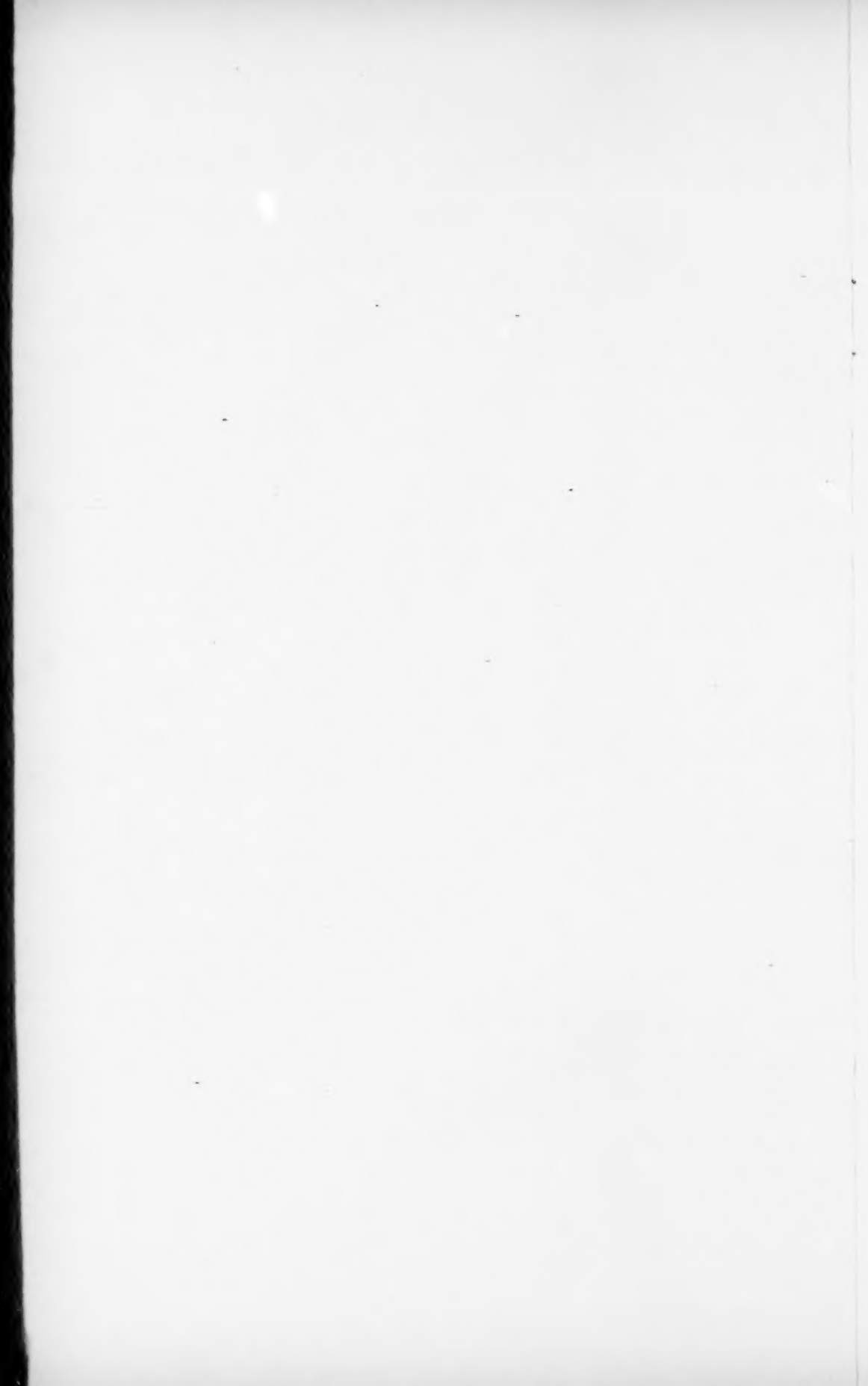
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9pp





WCAB CASE NOS. 77 LA 418-809  
79 LA 448-398

BEN COHEN  
(DECEASED)  
BEA COHEN  
(WIDOW)

vs. CALIFORNIA  
EXTERMINATORS;  
ROYAL INSURANCE  
CO.; ELDORADO  
INSURANCE CO.;  
INDUSTRIAL  
INDEMNITY;  
FIREMAN'S FUND  
INSURANCE; FREMONT  
INDEMNITY CO.

Workers' Compensation  
Judge:

PAMELA W. FOUST

Injury:

May 1962-December 30, 1976  
May 1962-September 16,  
1978

REPORT AND RECOMMENDATION ON  
PETITION FOR RECONSIDERATION

INTRODUCTION

Applicant, Bea Cohen, seeks timely reconsideration from the Findings and Order of January 10, 1986, granting defendant's Petition to Dismiss her application for death benefits resulting from the death of her husband, Ben Cohen. Petitioner contends that the Workers' Compensation Judge erred in finding that the application was not timely filed and should be dismissed pursuant to Labor Code section 5406 on a number of grounds.

FACTS

The facts are substantially as set forth in the Petition for Reconsideration.

## DISCUSSION

Petitioner contends that since Labor Code section 3202 requires that workers' compensation statutes be liberally construed in favor of injured employees and their dependents, Labor Code section 5406 should not have been interpreted in such a manner as to bar her claim for death benefits. Labor Code section 5406 reads as follows:

"Time limits for commencement of benefits collection proceedings; generally. Except as provided in Section 5406.5, the period within which may be commenced proceedings for the collection of the benefits provided by Article 4 (commencing with Section 4700) of Chapter 2 of Part 2 is one year from:

"(a) The date of death where death occurs within one year from date of injury;

"(b) The date of last furnishing of any benefits under Chapter 2 (commencing with Section 4550) of Part 2, where death occurs more than one year from the date of injury; or

"(c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

"No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury."

Petitioner has not set forth a specific "construction" of this statute by which her claim could be deemed timely and the plain language of the statute makes it difficult to conceive of one. As the Court noted in *Ruiz v. IAC*, 20 CCC 268 (1955), referring to Labor Code section 5406, "there is no ambiguity in the present wording of the section, and it neither requires nor admits of interpretation". It is

clear that claims asserted more than 240 weeks after the date of injury are barred.

The case of *Bianco v. IAC*, 9 CCC 206 (1944), cited by Petitioner, is inapplicable since it was decided prior to enactment of the present version of Labor Code section 5406 in 1947, and according to the Court in *Ruiz*, "from a review of the legislative history of section 5406, it clearly appears that the purpose of the 1947 amendment was to change the existing law as enunciated in the *Bianco* decision.

*Roblyer v. WCAB*, 41 CCC 669 (1976) can be distinguished from the instant case in that the dependent in *Roblyer* was a minor. *Arndt v. WCAB*, 41 CCC 151 (1976) involved just the type of knowledge of the industrial nature of the injury concerning which Ms. Cohen has filed a stipulation.

The *Ruiz* case is substantially indistinguishable from the instant case on the facts. Although the harsh result obtained in *Ruiz* has not been applied to some subsequent cases, the latter involved factual distinctions not present in the case herein. Applicant has not cited one case in which the dependent of the deceased employee has been successful in maintaining his or her claim under substantially the same fact pattern.

It is undisputed that one purpose of statutes of limitations is, as Petitioner notes in citing the case of *Addison v. State*, 21 Cal.3d 313 (1978), "to prevent the assertion of stale claims by plaintiffs who, without excuse, have failed to file their action until evidence is no longer fresh and witnesses are no longer available, thus rendering the claims difficult of (sic) impossible to defend." It is also obvious

that barring Petitioner's claim would not serve this purpose. However, it is again difficult to escape the clear words of Labor Code section 5406. In regard to this, the *Ruiz* Court expressed the opinion that,

"Accordingly, the time limitation appears not to be a normal statute of limitations, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits. Diligence in the presentation of the claim, so as not to be guilty of sleeping on one's rights, apparently has no bearing if the specified time provisos are not satisfied."

The *Ruiz* Court had also noted that the argument that a statute of limitations should not begin to run until a cause of action accrues and there is a remedy available was precisely the one that was advanced and prevailed in the *Bianco* case, and that the Legislature presumably had knowledge of this decision when Labor Code section 5406 was amended to its present form.

The doctrine of equitable tolling, as set forth in the *Addison* case, is inapplicable to the case herein. In *Addison*, the running of the six-month limitation period of the Torts Claims Act was suspended while the plaintiff's torts claims were pending in Federal District Court. The doctrine is described as relieving "a plaintiff from the bar of a limitation statute when, possessing several legal remedies, he reasonably and in good faith pursues one designed to lessen the extent of his injuries or damage, . . ."

The cases cited by Petitioner in support of her argument that Labor Code section 5406 violates her constitutional right to equal protection, involved instances of gender discrimination and discrimination against protected classes such as illegitimate children. Actually, if Petitioner's ar-

gument in this regard were correct, it would serve to invalidate all statutes of limitations. For example, what is the difference in substance, between the applicant who files his petition for increased benefits due to the serious and wilful misconduct of the employer 364 days after the injury as compared to one who files two days later? When the Legislature decides to establish a cut-off point in the form of a statute of limitations, of necessity, there will be those who fall on both sides of the line. This does not create a separate "class" of individuals.

Although the Judge believes that the decision was correct in accordance with present law, the result is admittedly harsh in the case of an applicant whose husband undisputedly suffered from an industrially-caused disease of a progressive nature which ultimately, and not surprisingly, resulted in his death. In this regard, Herbert A. Rubin, M.D., had stated in his report of February 1, 1979, filed herein, that, "cirrhosis is irreversable and will ultimately lead to end-stage liver disease and this is a process whose rate of development cannot be reasonably predicted."

Cirrhosis of the liver is only one of a number of internal disease processes involving a protracted period of disability eventually leading to death. Perhaps in the years that have elapsed since the 1947 amendment to Labor Code section 5406 and the 1955 *Ruiz* decision, medical knowledge has progressed to extend, but not ultimately preserve the lives of individuals whom 30 years earlier would have succumbed much more quickly. It is notable that Labor Code 5406, enacted in 1980, imposes upon dependents of those deceased of asbestos exposure, the sole limitation of filing the application within one year of the date of death.

Nonetheless, any changes in the law that would permit dependents of deceased employees such as Petitioner herein to maintain their claims for death benefits appears to be a matter for the Legislature.

### RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

/s/ Pamela W. Foust

Workers' Compensation Judge  
WORKERS' COMPENSATION  
APPEALS BOARD

PWF:kc

SERVED: February 14, 1986—/s/Katy Ceja

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WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA

BEN COHEN (Deceased),  
BEA COHEN (Widow),

*Applicant*

CALIFORNIA EXTERMINATORS;  
ROYAL INSURANCE CO.; ELDO-  
RADO INSURANCE CO.; INDUS-  
TRIAL INDEMNITY; FIREMAN'S  
FUND INSURANCE; FREMONT  
INDEMNITY COMPANY,

*Defendant*

Case No. 77 LA 418-809  
79 LA 448-398

OPINION AND  
ORDER DENYING  
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation judge with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration.

The workers' compensation judge found *Ruiz v. IAC* (1955) 45 Cal.2d 409, 20 CCC 265, to be controlling in this matter. *Ruiz*, being a decision of the Supreme Court, is binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, the Workers' Compensation Appeals Board, as a creature of statute, is required to assume the validity of the statutes which created



it. (*Matthews v. WCAB* (1972) 6 Cal.3d 719, 738, 37 CCC 124, 137.)

For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it is hereby, DENIED.

WORKERS' COMPENSATION  
APPEALS BOARD

/s/ Marilyn Lazar

I CONCUR.

/s/ Richard W. Younkin

/s/ C.L. Swezey

DATED AND FILED AT SAN FRANCISCO,  
CALIFORNIA MARCH 25, 1986

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.



(3)  
No. 86-723

Supreme Court, U.S.  
**FILED**

**DEC 15 1986**

JOSEPH F. SPANIOL, JR.  
CLERK

**In The  
Supreme Court of the United States**  
October Term, 1986

— o —  
**BEA COHEN,**

*Petitioner,*

vs.

**WORKERS' COMPENSATION APPEALS BOARD OF  
THE STATE OF CALIFORNIA; CALIFORNIA EX-  
TERMINATORS; ROYAL INSURANCE COMPANY;  
EL DORADO INSURANCE COMPANY; INDUSTRIAL  
INDEMNITY; FIREMAN'S FUND INSURANCE; AND  
FREMONT INDEMNITY COMPANY,**

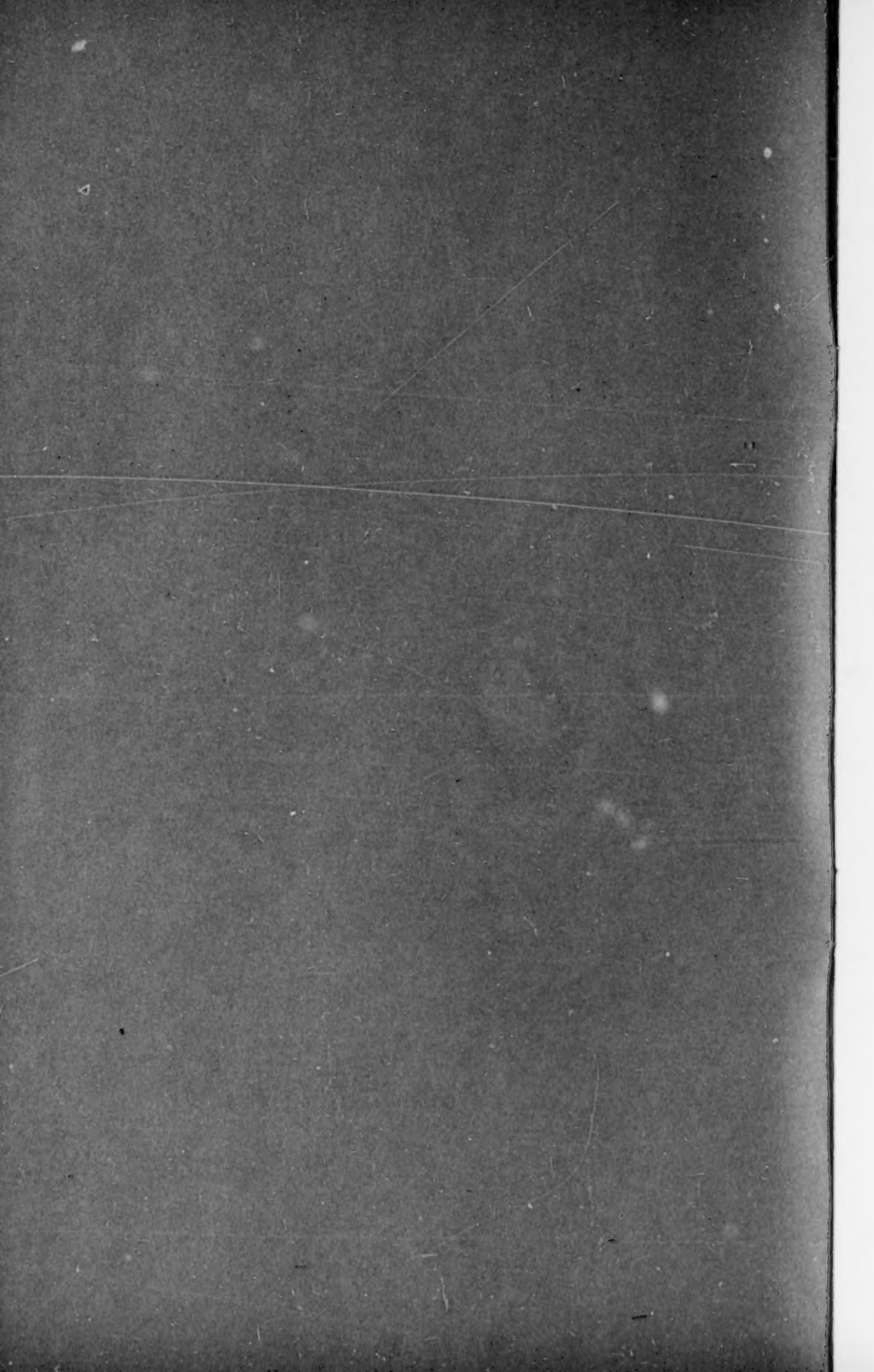
*Respondents.*

— o —  
**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF CALIFORNIA  
FOURTH APPELLATE DISTRICT**  
— o —

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**December 10, 1986**



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# **ANSWER TO PETITION FOR WRIT OF CERTIORARI**

## **I**

### **INTRODUCTION**

Petitioner Bea Cohen has sought a hearing on the basis that the instant case presents important issues requiring settlement by this court. The only issue presented is whether *California Labor Code Section 5406* can be construed so as to allow Petitioner to circumvent the statute of limitations. (All Labor Code citations hereinafter are to the California Labor Code.) Petitioner contends that application of the statute of limitations set forth in *Labor Code Section 5406*, barring her claim for death benefits before such claim accrued, constitutes a denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

— o —

## **II**

### **FACTUAL BACKGROUND**

The facts are not in dispute in this case. Petitioner's deceased husband, Ben Cohen, was employed as a pest control operator during the period from May, 1962 to September 16, 1978 by California Exterminators. Ben Cohen filed a workers' compensation claim with the California Workers' Compensation Appeals Board, case number 77 LA 418809, alleging injury from exposure to toxic substances. After trial before the Workers' Compensation Appeals Board it was found that Ben Cohen's cirrhosis of the liver arose out of and occurred in the course

of his employment by California Exterminators. The date of injury was found to have been September 16, 1978, which was the last date of exposure to the allegedly toxic substances which caused or contributed to his disease. The Workers' Compensation Appeals Board Findings and Award dated January 9, 1981 awarded Ben Cohen permanent disability benefits based upon his industrial injury.

Ben Cohen died on June 4, 1983, approximately 247 weeks after the date of injury fixed by the Court. Ben Cohen's widow, Bea Cohen (hereinafter referred to as Petitioner), filed an Application for Adjudication of Claim for death benefits on June 10, 1983. Respondents filed a Request for Dismissal as to the Application for Death Benefits on August 4, 1983 on the grounds that more than 240 weeks had passed from the date of injury to the date of death and that therefore the claim was barred pursuant to *Labor Code Section 5406*.

On March 19, 1985 the Workers' Compensation Appeals Board Judge issued an Order providing that Respondents' Petition to Dismiss the Application for Death Benefits was denied. On April 8, 1985 Respondents timely filed a Petition for Reconsideration of the Opinion and Decision.

On May 17, 1985, the Workers' Compensation Appeals Board issued an Opinion and Order Granting Reconsideration and Decision After Reconsideration regarding the March 19, 1985 Opinion on Decision. The Board found that the Workers' Compensation Judge should have considered the decision of the California Court of Appeal in *Berkebile vs. WCAB*, 144 Cal. App. 3d 940, 193 Cal.



Rptr. 12 (1983) and should then have determined whether the date of injury for the death claim was later than the date of injury for the original claim, and, if so, whether the death claim was timely.

On October 24, 1985, Petitioner filed a Stipulation wherein the Petitioner stipulated that she first had knowledge of the industrial nature of Ben Cohen's injury more than 240 weeks prior to the date of his death.

On January 10, 1986 the Workers' Compensation Judge issued an Order stating that Petitioner's application for death benefits was not timely, that Respondent's Petition to Dismiss the application of Bea Cohen for death benefits resulting from the death of Ben Cohen was granted pursuant to *Labor Code Section 5406* and that Petitioner's Application was therefore dismissed.

On March 25, 1986 the Workers' Compensation Appeals Board denied Petitioner's Petition for Reconsideration of the January 10, 1986 dismissal order. Petitioner then filed a Writ of Review with the Court of Appeal on May 7, 1986. The California Court of Appeal, Fourth Appellate District, Division Three, filed an Order on May 12, 1986 denying Petitioner's Petition for Writ of Review. On May 22, 1986 Petitioner filed a Petition for Hearing with the Supreme Court of the State of California. On July 31, 1986 the Supreme Court of the State of California denied Petitioner's Petition for Hearing.

## III

## ARGUMENT

## A

**A PARTY MAY NOT COLLECT DEATH BENEFITS IF THE DEATH OCCURRED MORE THAN 240 WEEKS FROM THE DATE OF INJURY**

Petitioner's right to recover death benefits is created by statute. *California Labor Code Section 5406* clearly provides the qualifying statute of limitations for workers' compensation death benefits. *Labor Code Section 5406* provides:

The period within which may be commenced proceedings for the collection of the benefits . . . is one year from:

(a) the date of death where the death occurs within one year from the date of injury; or

(b) the date of last furnishing of any benefits under Chapter 2 . . . where death occurs more than one year from the date of injury; or

(c) the date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

*No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury.*

*California Labor Code Section 5406* (West Supp. 1985) (emphasis added).

The last sentence of *Labor Code Section 5406* is further qualified by the definition of injury found in *Labor Code Section 5412*, as follows:

The date of injury in cases of occupational disease of cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

*California Labor Code Section 5412* (West Supp. 1985)

The combination of the above-mentioned code sections establishes the rule that where a party claims death benefits more than 240 weeks from the date when he or she first knew or should have known of the industrially caused injury, that claim is barred by the statute of limitations. This rule has been consistently applied by the courts of the State of California for the past thirty years.

The leading case in this area is *Ruiz vs. Industrial Accident Commission IAC*, 45 Cal. 2d 409, 289 P.2d 229 (1955) in which a unanimous California Supreme Court rejected the same arguments Petitioner has advanced. The Court noted, referring to *Labor Code Section 5406*, "There is no ambiguity in the present wording of the section, and it neither requires nor admits of interpretation". It is clear, therefore, that claims asserted more than 240 weeks after the date of injury are barred.

In *Ruiz* (supra), decedent worker contracted silicosis, a progressive disease similar to the cirrhosis suffered by Ben Cohen. In *Ruiz*, the decedent died 253 weeks after the date of injury and the applicant's widow applied for death benefits shortly thereafter, as did Petitioner in the instant case. The applicant in the *Ruiz* case advanced precisely the same argument which applicant herein urges, that the 240-week limitation period caused a claim to be barred before it ever arose. The court, however, ruled

that where the statute is written in plain language and the intent of the legislature is clear, the statute does not admit of interpretation. *Ruiz* (supra), at 414. The 240-week limitation was held by the *Ruiz* court to be more than a normal statute of limitations, more on the order of a "qualifying condition" for death benefits. *Ruiz* (supra), at 414.

In *Arndt vs. WCAB*, 56 Cal. App. 3d 139, 128 Cal. Rptr. 250 (1976), a case cited by Petitioner, a widow filed for death benefits more than 240 weeks after her husband was exposed to toxic asbestos substances. The court in *Arndt* held that her claim was not necessarily barred by the statute of limitations pending a factual determination as to the exact "date of injury"; that is, when she knew or should have known of the industrially caused injury. In the instant case, Petitioner has stipulated that she first had knowledge of the industrial nature of the injury more than 240 weeks prior to the date of her husband's death.

The statute of limitations of *Labor Code Section 5406* begins running at the time the petitioner knew or should have known of the industrial injury. The court in *Arndt* acknowledged the rule of *Ruiz* and stated:

"There (*Ruiz*) the court found mandatory the requirement of Labor Code Section 5406 that no proceeding for a death benefit may be commenced more than . . . 240 weeks after the 'date of injury'. But the court had before it no contention, or issue, or evidence, that the industrial causation of the worker's death was not known, or in the exercise of reasonable diligence would not have been known, to the Petitioner within those statutory periods."

*Arndt*, supra, at 149, 256.

Another case cited by the Petitioner, *Berkebile vs. WCAB*, 144 Cal. App. 3d 940, 193 Cal. Rptr. 12 (1983) merely affirms the holding in *Ruiz*. The court held that *Labor Code Section 5412*, when read with *Section 5406* means that a dependent's compensation claim must be commenced within 240 weeks of the time when that person knew or should have known that the injury was of industrial causation. *Berkebile* was a case in which the applicant had filed a claim for death benefits more than 240 weeks from the date of injury of the decedent employee, but within 240 weeks of the date that the applicant knew that the death was industrially caused. The facts of the case at bar are clearly distinguishable from *Arndt* and *Berkebile*. The parties herein have stipulated that the applicant knew that the deceased had an industrially caused injury *more than* 240 weeks prior to the date of his death.

The Petitioner cites *Roblyer vs. WCAB*, 62 Cal. App. 3d 574, 133 Cal. Rptr. 246 (1976), for the proposition that the courts of California have held that a claim was not barred after the 240 weeks had passed before the claim was filed. *Roblyer* is clearly distinguishable from the case in question. In *Roblyer*, the statute of limitations was tolled while the dependent was a minor in accordance with *Labor Code Section 5408*. In the case presently before this court, there is no issue of tolling of the statute based on *Section 5408* or any other statute.

The facts in this case are clear. The Petitioner has stipulated that she knew that her husband's injury was industrially caused more than 240 weeks before his death. Under the cases and statutes cited by both Petitioner and

Respondent, the statute of limitations provision of *Labor Code Section 5406* bars the Petitioner's claim for death benefits.

The Petitioner cites *Berkebile*, supra, for the proposition that the Court must interpret the statute in a manner which would not result in a right being lost before it accrues. However, *Berkebile* states that the workers' compensation law must be liberally construed unless otherwise compelled by the statute. *Only when the construction of the statute is ambiguous is it to be liberally construed.* *Berkebile*, supra, at 943. The statute is clear and unambiguous. The Legislature has left no room for liberal construction. Petitioner therefore seeks a ruling from this court that *Labor Code Section 5406* is unconstitutional. Such a ruling would leave the California Legislature helpless to impose any time limit on the filing of claims. Legislative ability to prevent fraudulent and stale claims would be thwarted. The courts would be open to a floodgate of claims and would have to make a case by case determination of whether the applicant had exercised due diligence. Such a decision would be in direct contradiction to the California Supreme Court case of *Ruiz* and the legislature's mandate. This would also make it difficult for applicants' attorneys and defendants to rationally determine when a right to death benefits lapses. The California Legislature obviously considered the possibility that there would be occasions when the death was too remote in time to qualify for death benefits and yet determined that the goal of preventing stale and fraudulent claims was more important. Since the right to death benefits derives exclusively from statutes enacted by the Legislature, the statutory conditions attached to their accrual by the Legis-

lature cannot be ignored. See *Johnson vs. WCAB*, 2 Cal. 3d 964, 971, 88 Cal. Rptr. 202, 205 (1970).

## B

### **LABOR CODE SECTION 5406 DOES NOT INFRINGE ON ANY FUNDAMENTAL RIGHT AND IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST**

*Labor Code Section 5406* contains no invidious discrimination, does not impact on a fundamental right nor a suspect class and promotes a legitimate state interest. Therefore, the statute must be upheld.

Petitioner's argument that the statute involves discrimination against survivors of long-lingering industrially-injured decedents who did discover causation promptly must be found to be without merit. Petitioner's equal protection claim does not identify any fundamental right or any suspect class which is infringed upon by *Labor Code Section 5406*.

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *San Antonio School District vs. Rodriguez*, 411 U.S. 1, 16 (1973); *Graham vs. Richardson*, 403 U.S. 365 (1971); *McLaughlin vs. Florida*, 379 U.S. 184 (1964); *Oyama vs. California*, 332 U.S. 633 (1948); cited at *Massachusetts Board of Retirement vs. Murgia*, 312 U.S. 307 (1975). In the absence of a fundamental right or suspect classification the statute is examined under the rational-basis standard. "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing



of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. (citation omitted). Such action by a legislature is presumed to be valid". *Massachusetts Board of Retirement*, supra, at 314.

In *Smith vs. Allen-Bradley Company*, 371 F. Supp. 698 (W.D. Va. 1974) the Court rejected federal due process and equal protection arguments regarding a statute of limitations. "Plaintiff's argument is that the application . . . [of the statute there in question] in this case bars a cause of action before it has accrued and as such prevents any hearing for redress of an alleged wrong committed by a private party. The answer to this is simply that the legislature, in its infinite wisdom may, within limits of rationality, determine what are actionable wrongs and the time limits within which lawsuits must be brought to redress such wrongs." *Smith*, supra, at 701.

Petitioner directs the Court's attention to *Weber vs. Aetna Casualty*, 406 U.S. 164 (1972) dealing with a Louisiana workers' compensation statute. In *Weber* the Court considered whether a statutory distinction in death benefits between legitimate and illegitimate children violated the right to equal protection. Noting that the statute infringed on the fundamental rights of procreation and association, and that the statute could not withstand the "strict scrutiny" test triggered by the presence of such fundamental rights, the Court invalidated the statute. The language of the Court in so holding is instructive in the instant case. The Court, citing familiar principles, recites the applicable two-pronged test: "What legitimate state interest does



the classification promote? What fundamental personal rights might the classification endanger?" *Weber*, supra, at 173. In the instant case, *Labor Code Section 5406* promotes the legitimate state interests of prompt resolution of claims, judicial finality, and an end to litigation, as well as the evidentiary consideration of the avoidance of stale claims. There is no suspect class involved here. The statute barring remote claims asserted more than 240 weeks after the date of injury does not infringe on any fundamental right. Therefore, pursuant to the principle set forth in *Weber*, supra, and the other authorities cited above, the test to be applied to *Labor Code Section 5406* is a "minimum scrutiny" test. The statute must be "rationally related to a legitimate state interest". *Weber*, supra, at 172. The right asserted by Petitioner to workers' compensation benefits was created by statute. Certainly the legislature which created that right may limit that right to instances which are not too remote in time to the date of injury. Such a limitation is "rationally related" to legitimate state interests. On that basis, the statute, as a reasonable statute of limitations, must stand.

---

#### IV

### CONCLUSION

Petitioners asserts that an extension of the limitation period and a change of long-settled law is warranted in this matter due to the inequity of the statute as applied to her. The California Legislature and Courts have clearly addressed this issue. The Legislature went so far as

to more clearly rewrite the statutory bar following a liberalizing judicial interpretation in a remarkably similar case. (*Ruiz vs. Industrial Accident Commission*, supra). Petitioner's contention that this statute raises a question of constitutional dimensions is simply unfounded. Petitioner's remedy, if any, appears to be with the California Legislature.

Petitioner's claim was filed after the expiration of the clearly worded statutory jurisdictional limit, no event or condition tolled this statute and the statute is merely a reasonable limitation which is rationally related to a legitimate state interest and without any impact on any fundamental right or suspect class. Therefore, the Petition for Writ of Certiorari should be denied and the decisions of the Courts of the State of California allowed to stand.

Respectfully submitted,

IBOLD & ANDERSON

By /s/ Marla L. Kelly

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ROYAL INSURANCE COMPANY

